

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TERRENCE BERNARD SEWELL,

Defendant-Appellant.

UNPUBLISHED

July 23, 2013

No. 310043

Wayne Circuit Court

LC No. 11-011738-FC

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant Terrence Sewell of second-degree murder, MCL 750.317,¹ and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.277b, for the shooting death of Mark Longino. On appeal, defendant claims that his trial counsel was constitutionally ineffective and that the prosecutor engaged in prejudicial misconduct. We discern no error in either attorney's performance and therefore affirm.

I. BACKGROUND

On September 30, 2010, Benjamin and Thomas Mathes engaged in a physical fight with two men in the parking lot of a party store. Longino, the Mathes brothers' uncle,² arrived in a minivan, ended the altercation, and drove away with his nephews. Defendant and several other individuals followed Longino and the Mathes brothers back to their home and loitered on the street and sidewalk outside. The testimony of the witnesses is not completely consistent, but it appears that defendant and some of his partners carried guns. At some point, the Mathes brothers also armed themselves. Longino, who was unarmed, crossed the street to speak to defendant's group in an attempt to ease the tension. As Longino walked back toward his home, defendant opened fire, shooting and killing Longino. A gun battle then erupted between the

¹ The jury acquitted defendant of the greater charged offense of first-degree murder.

² It is unclear whether there was an actual or "fictive kin" relationship between Longino and the Mathes brothers.

Mathes brothers and defendant's party.³ Defendant did not actually deny at trial that he shot a gun. He asserted, however, that the Mathes brothers shot first and he, or someone in his group, returned fire in self-defense.

II. PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecutor made a number of improper comments during opening statement and closing argument which denied him a fair trial. Because defendant failed to object during trial to any of the alleged instances of misconduct, these issues are not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context" to determine if the defendant was denied a fair trial. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

A. SHIFTING BURDEN OF PROOF

Defendant asserts that the prosecutor impermissibly shifted the burden of proof during closing arguments by commenting that there was no evidence that anyone else, other than defendant, fired the first shot. Specifically, during rebuttal argument, the prosecutor stated:

[Defense counsel], I believe in his opening he hit the nail on the head, and I agree with him. He said this case comes down to[] [w]ho shot first. That's what this case comes down to. Who shot first. And it is clear the only testimony you've heard, the only evidence you've heard, is that the Defendant shot first. No one else said anybody else shot first. The only people who testified said, all say, it was the Defendant. And that's the only evidence we have on the record is that the Defendant shot first. And this case comes down to who shot first. We know who shot first. The evidence tells us who shot first.

The prosecutor did not improperly shift the burden of proof.

A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof. [*People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010).]

"It is not error," however, "to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely." *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005) (quotation marks and citations omitted).

³ There is no record indication that anyone else was charged in relation to this incident.

Here, defendant asserted a defense that someone else fired the first shot. All the prosecution evidence established that defendant fired first and defendant presented absolutely no evidence to support his defense. The prosecutor was free to comment on defendant's failure to support his defense without running afoul of the prohibition against shifting the burden of proof.

B. VOUCHING FOR WITNESS CREDIBILITY

Defendant also argues that the prosecutor improperly vouched for and bolstered his witnesses' credibility. During closing argument, the prosecutor stated:

And before I leave you, ladies and gentlemen, remember this, [I] just want to reiterate that people in different perspectives, different areas, we all see things — people see things differently. We can look at the same thing and people can describe something a little different. And in a situation like this, this is no different. As a matter of fact, *I think that these witnesses are even more credible because their stories aren't exactly the same.* When [p]eople's story [sic] are exactly the same, you should be suspicious. When they have different — little differences here, I think that is normal. [Emphasis added.]

It is well-established that

a prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness. But a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. [*People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).]

The prosecutor did not suggest that he had any special knowledge about the witnesses' credibility. Rather, the prosecutor responded to defendant's argument that the four eyewitnesses were incredible because they perceived the events in question differently. The prosecutor was permitted to urge the jury to accept his theory reconciling those inconsistencies.

C. APPEAL TO SYMPATHY

Defendant further contends that the prosecutor improperly appealed to the jury's sympathy by referring to Longino as the "peacemaker." "Appeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). A prosecutor may structure his argument to fairly respond to the defense, however. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Even when a prosecutor's statements could tend to elicit sympathy for the victim, reversal is not warranted if the "comments were relatively brief and did not likely deflect the jury's attention from the evidence presented[.]" *Unger*, 278 Mich App at 237.

During opening statement and closing argument, the prosecutor stated that this case was about the murder of a "peacemaker." The prosecutor referenced Longino as a "peacemaker" seven times in opening statement. During closing argument, the prosecutor made the

characterization four times. Especially during opening, the commentary about Longino's "peacemaker" role permeated the argument. The comments were not brief or isolated.

Yet, the references to Longino as a "peacemaker" were not improper; they were based on the evidence. Both Benjamin and Thomas Mathes testified that Longino broke up the fist fight at the party store and tried to prevent a violent situation in front of his home. Benjamin's girlfriend similarly testified that she saw Longino cross the street and speak peaceably to defendant's group. The evidence supported that Longino did absolutely nothing to provoke defendant and met a violent death anyway.

Even if we deemed the prosecutor's comments to be improper, reversal would not be warranted. The court specifically instructed the jury to "not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way." "[J]urors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The prosecutor's comments were not so flagrant as to overcome this presumption.

Finally, defendant argues that the cumulative effect of the instances of prosecutorial misconduct warrant reversal. There is no merit to defendant's claim because there were no errors to aggregate into a cumulative effect. *Unger*, 278 Mich App at 258.

III. ASSISTANCE OF COUNSEL

Defendant asserts that he was denied the effective assistance of counsel. Defendant failed to properly preserve this issue by moving for a new trial or *Ginther*⁴ hearing, and our review is limited to mistakes apparent on the existing record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review findings of fact for clear error and rulings on questions of constitutional law de novo. *Id.* To establish a claim of ineffective assistance, a defendant must demonstrate that counsel's performance was so deficient that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "[D]efendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

A. PROSECUTOR'S STATEMENTS IN OPENING AND CLOSING

Defendant contends that counsel was ineffective for failing to object to the instances of alleged prosecutorial misconduct raised in his appellate brief. Defendant's challenges to the

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

prosecutor's performance, however, are baseless. The failure to raise a meritless objection cannot constitute ineffective assistance of counsel. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

B. POLICE STATEMENT OF PROSECUTION WITNESS

Defendant also challenges trial counsel's failure to object to the admission of prosecution witness Brian Darrell's earlier statement to the police. Defendant asserts that the statement was inadmissible hearsay. Darrell was standing on a nearby corner when the shooting took place, admittedly selling crack cocaine. Immediately after the shooting, Darrell told a police officer that he saw "Bones" shoot Longino. "Bones," Darrell later explained, is defendant's nickname. Darrell was acquainted with defendant because defendant is the uncle of Darrell's friend. At trial, however, Darrell initially denied witnessing the shooting, speaking to the police, or seeing "Bones" in the courtroom. The prosecutor showed Darrell his written statement to the police and Darrell then testified regarding the events he witnessed and identified defendant as the shooter.

Darrell's earlier statement to the police was a prior inconsistent statement that was admissible to impeach Darrell's testimony on the stand. "Extrinsic evidence of a prior inconsistent statement can be used to impeach but it cannot be used to prove the truth of the matter asserted, unless, of course, it falls within a hearsay exception." *People v Jenkins*, 450 Mich 249, 273; 537 NW2d 828 (1995). Under MRE 613(b), a party may offer extrinsic evidence of a witness's prior inconsistent statement under certain circumstances:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

To present evidence under MRE 613(b), the proponent must lay a proper foundation.

[T]he proponent of the evidence must elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness. [*Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007).]

Darrell's prior inconsistent statement to the police was admitted to impeach his trial testimony denying that he witnessed the crime. The prosecutor did not present the police statement to prove the truth of the matter asserted. The conditions of MRE 613 were met. The prosecutor allowed Darrell the opportunity to explain the inconsistency and Darrell changed his tune on the stand. Defendant had the opportunity to cross-examine the witness regarding his prior inconsistent statement. The prosecutor also laid the proper foundation to present the evidence. The prosecutor first elicited testimony from Darrell denying that he witnessed the shooting, asked Darrell "to admit or deny making" an earlier statement to police, and subsequently presented the police statement for Darrell's review. Darrell then admitted that he made an earlier inconsistent statement and changed his testimony accordingly. The statement

was admissible and counsel cannot be found ineffective for failing to object. *Ericksen*, 288 Mich App at 201.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Jane M. Beckering

/s/ Douglas B. Shapiro